Remedies in Innovation Mergers

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15 October 2018
17th EU-China Competition Week

*) The views expressed in this presentation are those of the author and do not necessarily reflect the views or opinions of the European Commission.
Introduction

- In fast-moving industries, mergers can potentially create significant competitive harm (as they may eliminate **nascent competition** in concentrated markets from the outset)
- But conversely, technologically **complementary mergers** can also create particularly large welfare gains in such industries
- Designing remedies in fast-moving markets is challenging, as the **scope of competition** in the future may not be known today
- Yet, remedies should **follow the competition concern**, but how?
- This presentation provides a brief discussion of the appropriate **scope of remedies** in markets with fast technological changes
- The discussion will be guided by **recent cases at the Commission** that involved innovation concerns in remedy design: **GE/Alstom**, **Dow/DuPont** and the EU mobile telephony mergers
Scope of remedies in innovative industries

- A key concern for remedies in innovative industries is their **scope to ensure viability**
- Importantly, divested businesses must be viable not only in the short run, but also have capabilities to **compete for the long run**
- While the long run may be difficult to predict in fast-moving industries, the scope of remedies will determine the **general capability of competing** for future markets
- Often, a **wider scope of remedies** may be necessary, for instance:
  - **R&D capabilities** (research teams)
  - **Financial capabilities** to be a viable competitor in innovation competition
  - **Access to essential inputs** supplied by the seller at reasonable cost
  - **Neighbouring markets** to address concerns of potential competition/convergence
- This is particularly true in cases where the theory of harm is explicitly **built on innovation competition**
Case study: GE/Alstom (2015)

- Merger in **gas turbines** with concerns mostly for large turbines
- Key issue of remedy scope: should existing **servicing contracts** ("installed base") be included in the scope of the divestment?
- Servicing accounts for **significant part of profits** and is offered together with the gas turbines (through long-term agreements)
- In-depth assessment of qualitative evidence revealed the existence of several channels through which access to sizeable installed base influences **competitiveness** of OEMs:
  - Ability/incentives to **innovate** and "prove" product (indirect network effects)
  - Access to customers
  - Sourcing synergies
  - Cashflow
- Final remedy included part of Alstom's **installed base**
Case study: Dow/DuPont (2017)

- "Merger of equals" in crop protection and seeds
- Allegedly "5 to 4", but investigation found
  - Strong R&D overlaps (closeness) in important areas for future products
  - Planned R&D suppression post-merger
  - Therefore, concern about restriction of innovation competition raised
- Divestment included most of DuPont's overlap products (insecticides and herbicides) plus DuPont's global R&D organisation (including discovery pipeline and part of development pipeline)
- Divestment is a reverse carve-out from DuPont (no "mix & match"), ensuring that current products are matched to the underlying R&D capabilities
- Aim is to render divestment of current products viable over the medium term, and to replicate innovation capabilities of DuPont
Case study: Mobile mergers (2014-2018)

- As discussed in the previous presentation, the Commission has recently assessed a large number of mobile mergers.
- Some of these transactions were cleared subject to divestiture/creation of new MNO or access remedy for MVNO.
- The "new" competitors required access to network capacity etc., which raises complex questions in such a fast-moving market:
  - Desire to provide access at marginal cost to replicate pre-merger incentives.
  - How to determine the "right" access price if technology is changing quickly?
  - How to determine access terms when contract is renewed in the future?
- Questions addressed through:
  - Capacity-based access that guarantees access at marginal cost.
  - Capacity expansions feasible.
  - Future-proofness concerns easier to address with structural MNO solutions than with behavioral MVNO solutions.
Conclusion

• In fast-moving markets, not only concerns about markets as they currently are have to be addressed, but also concerns about how firms compete in the future or for the future
• This includes innovation competition (e.g., Dow/DuPont) and potential competition (e.g., Facebook/Whatsapp)
• It may require wider-ranging divestitures than would be the case for a static concern (and potentially access remedies)
• In particular, divested businesses must have the capability to engage in R&D and compete in a changing product space without over-reliance on the merging parties
• With large uncertainty, even divestitures may not be able to solve reliably identified competition concerns
• Conversely, competition concerns cannot be mere speculation